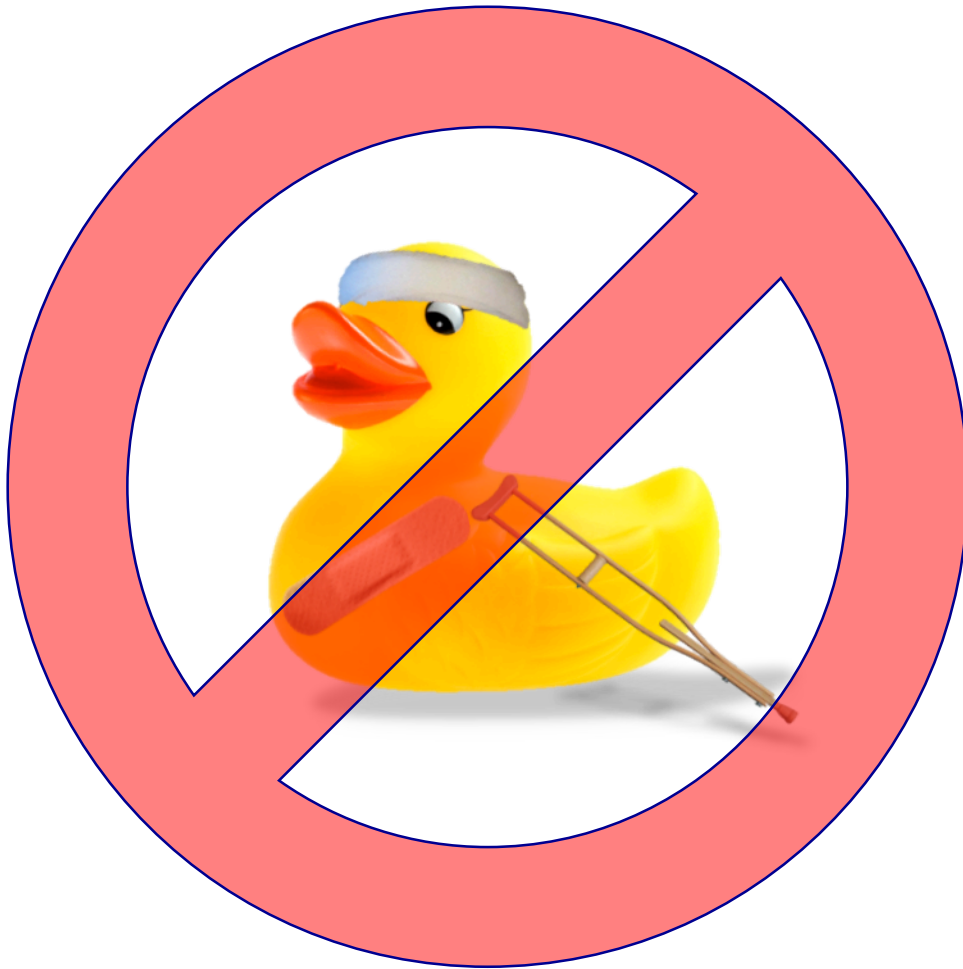


No Lame Deal in the Lame Duck



NOVEMBER 2012

FROM THE OFFICE OF SENATOR JIM DEMINT

Executive Summary

The American people may be done with Washington politics for the year, but they are about to discover that Washington politics may not be done with *them*.

With trillions of dollars in automatic tax increases and spending cuts bearing down on the economy, Washington's political class chose all year to put off action on this so-called "fiscal cliff" until *after* the November elections. That is, until *after* incumbent politicians were safely re-elected, and the public's attention turned elsewhere.

Sure enough, the controlling parties of the House, Senate, and White House *all* won re-election last week, and all three are now free to embark on a new Washington tradition: the "lame duck" session.

Once uncommon and unremarkable, "lame duck" sessions of Congress have grown increasingly frequent and substantive in recent decades. The 2012 version, which will be the eighth in as many Congresses, will likely take up legislation that will influence fiscal policy for a generation – without any accountability to the public.

This report details the intrinsic problems with "lame duck" lawmaking – the "zombie" legislators, the hidden agendas, the special interest handouts, and more. It explains why any 2012 "lame duck" may be the worst ever put over on the American people. And it makes the case for why Americans – right, center, or left – should oppose "lame duck" legislating in principle, and end the corrosive practice once and for all.

REPORT HIGHLIGHTS:

- *"Lame Ducks" are growing more frequent. 1950-1990 = 6; 1990-2012 = 9.*
- *86 Reps. and Sens. already leaving Congress.*
- *79% of former Members become lobbyists.*
- *Leaders deliberately hide "lame duck" agendas from public.*
- *"Must Pass" legislation attracts special interests, creates perverse incentives.*

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I. Introduction

The outcome of last week's elections – the re-election of a Democratic president, a Democratic Senate, and a Republican House of Representatives – changes nothing about the signal political and economic facts of the day. Americans are *still* slogging through the worst economic recovery since the Great Depression, with economists projecting little improvement in growth or job creation in the foreseeable future. And *still* exacerbating the situation are a series of federal laws set to change, automatically, in coming weeks, known collectively as “the fiscal cliff.”

On one hand is a multi-trillion dollar tax increase – \$500 billion for 2013 alone – set to hit almost every worker, family, investor, and business in the country. On the other hand are the automatic spending cuts to Medicare, national defense, and other federal programs Congress agreed to trigger on January 1st, if by then it could not pass more clearly defined savings elsewhere in the budget.

The tax increases have been scheduled for two years, the spending cuts for more than one. Yet despite the ticking clock, Congress has done nothing, deliberately waiting until *after* the November elections to take up the “fiscal cliff” in a so-called “lame duck” session.

“Lame ducks” were once rare and inconsequential. It was understood – both by the public and congressional leaders – that lawmaking without public accountability was undemocratic, unrepresentative, and dangerous. Occasional mop-up votes to complete unfinished, uncontroversial legislation were one thing, but passing important, disputed bills in a “lame duck” was unheard of.

In recent decades, however, “lame ducks” have grown progressively more common, and more substantive. Rather than the ad hoc completion of unfinished business, “lame duck” agendas are planned months in advance, and deliberately concealed from the American people, until *after* the election, when public attention on politics has waned. They are then convened amid manufactured crises and/or up against artificial policy deadlines, in order to create a sense of urgency to pass whatever bill congressional leaders produce, regardless of its merits. Meanwhile, the timing of “lame duck” sessions – 23 months before the next election, while the public's attention is turned toward the holidays – maximizes political immunity for Representatives and Senators supporting bad legislation.

This report details the problems with “lame duck” sessions of Congress in general, and this year's in particular, in the hope that Americans of all political persuasions will reject “lame duck” lawmaking once and for all and insist Congress pass major legislation only under the conditions of public scrutiny and democratic consent. Conservatives and Republicans in particular should adopt a principled position against “lame duck” lawmaking in all cases, rather than opposing and supporting them simply according to temporary partisan tactical advantage.

II: Lame

The problem with “lame duck” sessions of Congress is that they serve the interests of politicians at the expense of the American people. “Lame ducks” are designed to protect the former by excluding the latter. Though invariably covered by the media in terms of partisan rancor, “lame ducks” are not tactics one party uses against the other, but which both parties use against the American people.

There are any number of subtle – and not-so-subtle – ways “lame duck” congressional sessions undermine American self-government. But most of the reasons “lame ducks” are so lame fall into a few discrete, but interconnected, categories:

Reason #1: Zombies

The first and most obvious problem of lame duck sessions of Congress are the “lame duck” *members* of Congress – Representatives and Senators who have either announced their retirement or been replaced by voters. These few dozen “zombie” legislators, unlike their colleagues, are utterly free from public accountability. They are free, for two months and at taxpayer expense, to vote for whatever they please (or whatever pleases their prospective employers, but more on that in a moment), without their constituents being able to do anything about it.

Reason #2: The Hidden Agenda

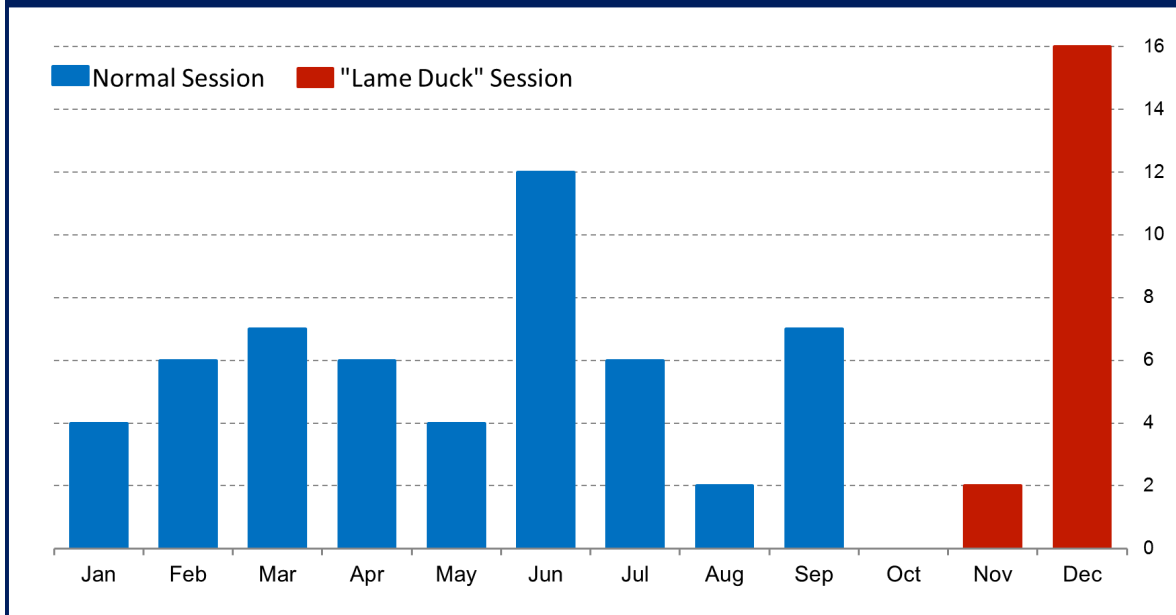
If the first problem is the legislators nobody voted for, the second is the *legislation* nobody voted for. As yet, the 2012 “lame duck” agenda has not been publicly disclosed by the leadership of either party or either house of Congress, and in all likelihood won’t be until a deal has already been reached.

Why hide the agenda? As the nonpartisan Congressional Research Service put it:

“The consideration of legislative proposals, particularly those with significant budgetary implications, is sometimes postponed until a lame duck session, often to avoid the need for politically difficult votes before an election.”

The motivation is a lot like that of teenagers biding their time in the basement waiting for their parents to go to bed before initiating Saturday night’s *real* plans. See the chart below showing the curious spike in Senate activity in 2010 *after* the mid-term elections.

Bills and Nominations Taken Up in the US Senate, 2010



Reason #3: "Must Pass"

In order to grease the skids for "lame duck" legislating, Congress deliberately sets some policies annually, such that they expire and must be re-passed by the end of every year. This way, legislation extending popular tax provisions and reasonable reimbursement rates for physicians seeing Medicare patients, for instance, can serve as a vehicle for all kinds of other wasteful and damaging policies.

These and similar deadline bills are known in Washington-ese as "must pass" – legislation that is all but certain to be signed into law.

When Congress takes up *must pass* legislation, it's like a bartender announcing "last call" among Washington's special interests. Literally thousands of lobbyists descend on the Capitol to argue, cajole, and otherwise *quid* members' *quos* to get their clients' favorite provisions inserted into the fast-tracked bill.

At the same time, "lame duck" *must pass* bills give lawmakers one last chance to slip their least popular ideas into federal law with few noticing, and fewer objecting.

And so, *must pass* bills take on all sorts of frivolous add-ons, from earmarks to pork barrel spending to tax carve outs to corporate subsidies. The politicians who insert these measures happily collect oodles of campaign contributions along the way.

Meanwhile, according to the Center for Responsive Politics, 79% of Representatives and Senators who leave Congress go on to become lobbyists themselves.

And yet, even to principled politicians on the left and the right, it's not worth massive tax increases or scuttling entitlement programs over a few pet projects or sketchy deals. So Congress lets them slide, and the lobbyists pop the corks on K Street.

Reason #4: Never Let a (Manufactured) Crisis Go to Waste

Given the rank unseemliness, sometimes even *must pass* bills get delayed. When this happens – or to prevent it from happening in the first place – the forces with an interest in the “must pass” bill “must passing” have one more card to play: scaring the pants off the American people.

The media plays along, and in no time, the *must pass* bill is presented as all that stands between us and a recession, a military catastrophe, a global crisis, denial of health care to widows and orphans – you name it.

It's hard to blame members – even those who know better – for backing off when this kind of pressure mounts. Even 23 months before the next election, no one wants to be the guy who brought about doomsday for the economy, the troops, mom, or apple pie. Never mind how undemocratic or shady the process; never mind the special interest giveaways; never mind the deliberate misleading of the American people – in Washington, the bills that “must pass” do pass.

It will remain so until the American people assert their constitutional rights and demand otherwise.

Eighty-two
sitting
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III: The Mother of All “Lame Ducks”

What makes 2012's post-election session of Congress, in the words of U.S. Rep. James Clyburn (D-S.C.), “the mother of all lame ducks?”

For starters, all four of the problems above will certainly be in play. Eighty-two sitting Representatives and Senators have either announced their retirements or been defeated, and already count among the “lame duck's” walking dead.

Senate leaders have both ignored House legislation addressing the fiscal cliff *and* largely refused to divulge their own plans to address it.

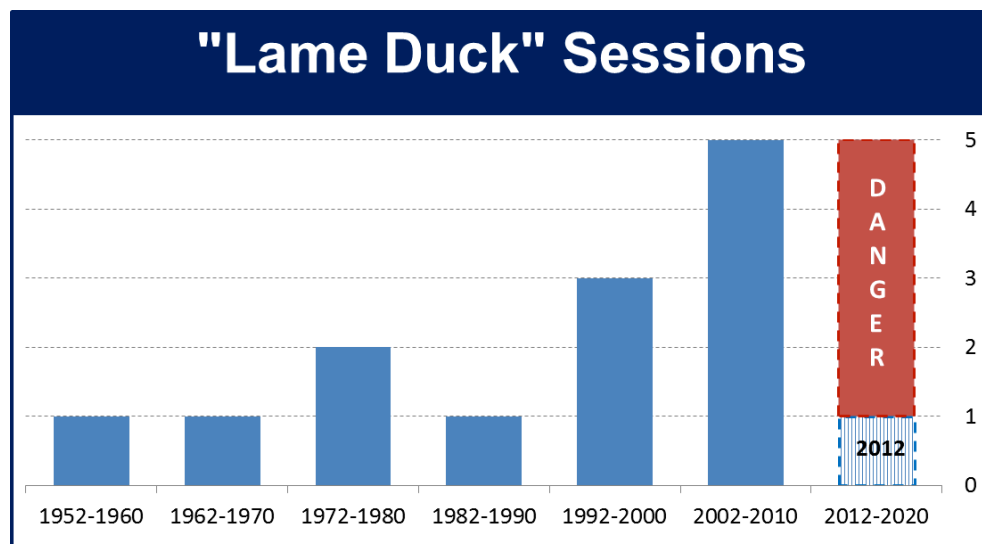
As noted above, we are fast approaching deadlines triggering trillions of dollars in automatic tax increases and hundreds of billions in spending cuts.

And so, for the 2012 “lame duck”: zombie legislators? hidden agenda? “must pass” deadlines? manufactured crises? Check, check, check, check.

Combine all that with the fact that Congress has deliberately put off dealing with the “fiscal cliff” all year, even *adjourning* seven weeks before the elections, fully intending only to come clean with the American people *after* the campaign ended and they could no longer be held accountable, and it’s not unreasonable to expect the 2012 “lame duck” session of Congress to be the worst in history.

III. A Brief History of Lame Ducks

Until recently, “lame duck” sessions of Congress were rare. There were only five during the twenty-one Congresses between 1952 and 1992. They were also uneventful – very brief, and never taking up major legislation. Since 1998, there have been eight “lame ducks” – one in every Congress (see nearby chart).



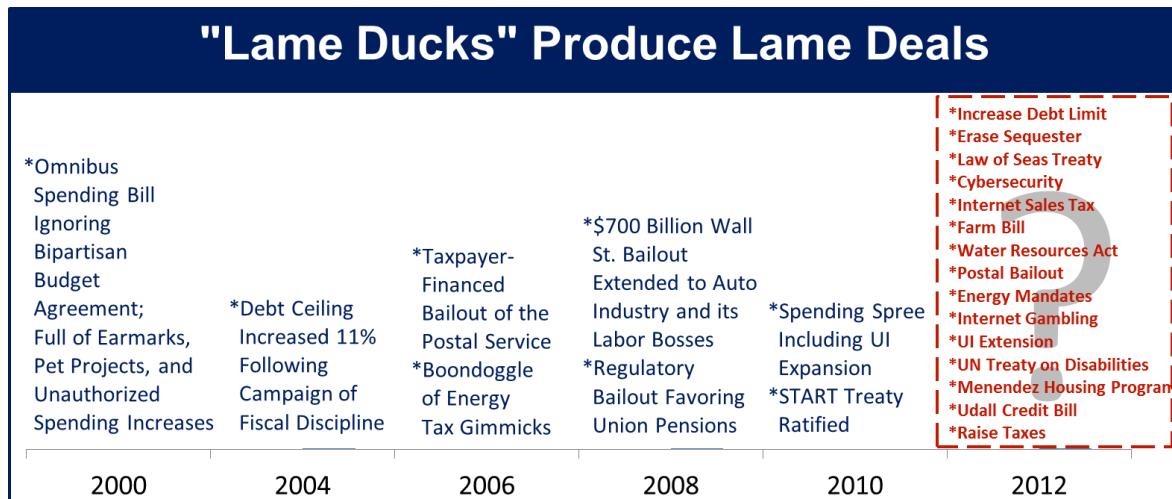
As “lame ducks” have grown more frequent in recent Congresses, they have also grown more substantive.

After the 2000 elections, for instance, the House and Senate came back to Washington to pass an omnibus spending bill (multiple spending bills funding multiple departments and agencies rolled into one massive “must pass” bill). Alas, big spending politicians on both sides of the aisle felt constricted by the bipartisan budget agreement reached earlier in the year (that is, during the campaign), so both sides just agreed to ignore it. Of course, they didn’t say so until *after* the election – and in the “lame duck,” they blew through the budget with big-spending earmarks, pet projects, and billions of unauthorized increases.

In 2004, Republicans and Democrats campaigned on fiscal discipline. Then in the “lame duck,” they increased the debt ceiling 11% when no one was looking.

In 2006, the “lame duck” produced a taxpayer bailout of the Postal Service, and a collection of energy tax gimmicks that gave birth to many of the federal government’s green energy boondoggles of recent years.

In the 2008 “lame duck,” convened between Barack Obama’s election and inauguration, many in Congress supported the expansion of the \$700 billion Wall Street bailout to the labor bosses of the auto industry. They also provided for a regulatory bailout, via accounting gimmick, mainly for union pension pensions, creating a systemic long-term risk in the system.



In the 2010 “lame duck,” after voters fired Democrats for presiding over two years of bailouts, spending, and takeovers, those same Democrats returned to Washington to pass *more* spending before Republicans took control of the House of Representatives. Democrats extended unemployment insurance, continuing their agenda to expand the welfare rolls even after the American people rejected that approach to economic policymaking. The Senate also ratified a treaty with Russia, fearing it would not have been able to do so in the new Congress. The new START Treaty was not something either party ran on in the 2010 campaign, nor were controversial treaties ever debated and ratified in “lame duck” sessions before.

And, of course, the 2010 “lame duck” was where Congress and president extended tax rates for two years, through this December, all but guaranteeing the 2012 “lame duck” now bearing down on us.

Regrettably, the increasing size and substance of “lame duck” agendas is a trend that will only accelerate in 2012. This would likely have been the case whatever the outcome of the elections, but now with essentially all three of Washington’s political incumbents – President Obama, Senate Democrats, and House Republicans – re-elected, it is all but assured. “Lame ducks” don’t serve the interests of incumbents on accident.

IV. The Wish List

Since the House of Representatives has already passed legislation extending current tax rates and offsetting the sequester cuts with other budget savings, the agenda of the 2012 “lame duck” will be set almost entirely by the Senate. So, Congress will *probably* take up the “fiscal cliff” issues – we just don’t yet know how.

But the “fiscal cliff” is just the beginning. Though Senate leaders have not shared with the American people exactly what else they have planned, unconfirmed leaks and educated guesses point toward as many as 25 potential bills, including:

1. Increasing the debt limit – the statutory limit is currently \$16.394 trillion, and is expected to soon be reached
2. Law of the Seas Treaty – an unprecedented surrender of sovereignty to international bureaucracies, on issues from sea lanes to energy policy
3. Internet sales tax – a federal decree disadvantaging internet companies by forcing them to collect sales taxes not only according to their state and locality, but across all 50 states and thousands of local tax jurisdictions.
4. Farm Bill – a bloated combination of corporate giveaways and welfare dependence
5. Cybersecurity – an enormous federal power grab over the Internet putting Industrial Age federal regulations on a 21st century sector.
6. Water Resource Development Act – historically a cornucopia of earmarks
7. Energy and Efficiency Mandates – job-killing regulations that interfere with the free market and inhibit technological innovation and job creation
8. Postal Service Bailout – yes, another one
9. Unemployment Insurance extension – expanding welfare while limiting job opportunities
10. UN Treaty on Disabilities – another treaty surrendering local, state, and national autonomy to international bureaucrats
11. Sen. Menendez’s Housing Program – a politically motivated further loosening of refinance rules for mortgages backed by Fannie Mae and Freddie Mac
12. Sequestration Changes – backtrack on Congress’s promise to finally start cutting spending, which could lead to a disastrous credit downgrade, or hold the sequester as leverage to pass huge defense cuts or tax increases

13. Internet Gambling – an enormous boon for the state of Nevada, allowing it to effectively regulate the Internet poker industry and to profit by collecting a federal government-imposed poker activity fee.

14. Credit Lending Increase Bill (S. 2231) – a controversial piece of legislation that only represents a small piece of potential financial reforms and should be part of a larger debate on how to fix our unsustainable, top-heavy financial system.

15. Tax increases – since the House has already voted to keep current tax rates, any House-Senate lame duck negotiations would open the door for tax hikes

Notice, *only one* of these specific issues – taxes – was seriously debated in the 2012 election campaign. Congressional leaders hid their agenda from the American people, and plan to vote for it only after the voters have looked the other way.

But even *that* may not be the worst of it.

V. Over the Cliff

The “fiscal cliff” is very real, and so is the pain the American economy will endure if we go over it. By almost any objective measure, the current recovery is the weakest since the Great Depression. Imposing the largest tax increase in American history on this fragile economy would cost millions of jobs and possibly hurl the country into a double-dip recession.

No one on either side of the aisle should dismiss the consequences of going over the cliff. But as bad as it could be, a typical Washington deal – a bipartisan agreement to put off difficult decisions and foist the inevitable costs on future generations – could be even worse. We as a nation are fast running out of road to kick the can down.

The contours of a bipartisan fiscal cliff “deal” can be easily gamed out: extension of some tax rates, a tax increase on higher income earners and small businesses, accounting gimmicks to fabricate long-term budget “cuts” that will never really materialize, and the extension of the special tax rules for the most favored special interests.

Such a deal will eventually lead to a credit downgrade, and expedite the arrival of the United States’ European-style debt crisis.

As with corporations like Enron and Lehman Brothers, and nations like Greece and Spain, the United States’ deteriorating fiscal situation will be fine... until it’s not. When the bond market collectively decides a debtor has borrowed beyond its means, lenders begin to charge higher interest rates for future borrowing. Given our \$16 trillion and growing debt, every percentage point increase in interest rates equals \$1.3 trillion more in interest payments over ten years. So even if rates rise only one percentage point more than projected - let alone to even higher historical averages – the increased

borrowing costs *alone* will swallow up any meager savings on the scale Congress has heretofore contemplated.

That's the *real* fiscal cliff – the moment the United States can't borrow any more money at low interest rates. That cliff is coming sooner than we might think, and sooner still if Congress passes the kind of self-serving bipartisan agreement we have every reason to expect from a "lame duck" session.

VI. Three Criteria

The worst case scenario in the 2012 "lame duck" is just that kind of bad deal Washington politicians are only too happy to negotiate – no tough decisions, smoke and mirrors, all passed in the dark of night up against an engineered deadline panic.

The solution to the fiscal cliff, which should have and could have easily been agreed to before the election, is clear. First, there should not be *any* tax increase on *anyone* in this weakened economy. Previously, even President Obama made the same conclusion in the summer of 2009, when he said that raising taxes in a recession "would just suck up—take more demand out of the economy and put business further in a hole." Raising taxes in such a downturn, the president said, is "the last thing you want to do." Second, we should stop indulging in class warfare and end the talk of decoupling tax rates. And third, if the sequester cuts are to be replaced, they should be replaced dollar-for-dollar with *real* spending reductions in the current fiscal year.

Any alternative – higher taxes, marginal rate gamesmanship, and phony budgeting – will leave the economy and the nation worse off.

House Republicans already passed legislation addressing the "fiscal cliff" with legislation that met all three criteria *before* the election, in plain view of the American people – and were subsequently rewarded with re-election. Republicans who promised during the campaign not to raise taxes should keep that promise, and not scurry back to Washington to scrounge for as good a deal as they think they can get. The federal government's response to the "fiscal cliff" is in the president's hands, as it should be: he can either encourage the Senate to pass the House solution, or send us over the cliff.

The American people were never presented with competing "lame duck" agendas, so Washington has no business trying to pass one. Conservatives may not like the policy outcome in any case, but rejecting the "lame duck" and achieving an honest, transparent process respectful of the American people and our republican institutions is significant in its own right. Many on the Left – eying short-term partisan advantage – may even join conservatives in blocking any "lame duck" deal in 2012, eager to press their advantage in the new year. But even if opposition to this year's post-election session succeeds via such cynical calculus, the precedent against "lame ducks" is worth fighting for nonetheless.

This is a fight we can win, and a win the American people deserve.